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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940.

No. 671.

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

V.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; AND DAVIS SCHOOL SERVICE, RESPONDENTS.

BRIEF OF PETITIONER.

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WESTERN-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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BRIEF OF PETITIONER.

I.

STATEMENT OF THE CASE.

(a) Explanatory Statement.

This brief is submitted for the purpose of answering the argument advanced by respondents in their brief in opposition to petitioner's application for a writ of certiorari, heretofore filed herein, and cover points which are pertinent to the issue. Although the argument advanced by respondents was ineffectual so far as the granting of the writ was concerned, it probably will be urged upon this Court in a consideration of the case upon the

merits. We, therefore, feel that the fallacies of the argument should be called to the attention of the Court.

This brief does not contain any material covered by the previous brief. It is our wish that the Court consider this material herein as supplemental and will read this and the previous brief as though they were one.

(b) Opinion of the Court Below.

See page 7, Brief in Support of Petition for Writ of Certiorari, filed herein.

(c) Statement of Matters Involved.

See page 2, Petition for Writ of Certiorari, filed herein.

(d) Specification of Errors.

See page 9, Brief in Support of Petition for Writ of Certiorari, filed herein.

II.

PROPOSITIONS OF LAW.

I.

Laws may be enacted providing for the prevention of unconscionable gains in any business or vocation affecting the public welfare.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Knoxville Iron Co. v. *Harbison*, 183 U. S. 13, 46 L. ed. 55.

Yeiser v. *Dysart*, 267 U. S. 540, 69 L. ed. 775.

Bunting v. *Oregon*, 243 U. S. 426, 61 L. ed. 830.

Block v. *Hirsch*, 256 U. S. 135, 65 L. ed. 865.

Griffith v. *Connecticut*, 218 U. S. 563, 54 L. ed. 1151.

Wholesale Tobacco Dealers Bureau v. *National*

Candy & T. Co., 11 Cal. (2d) 634, 82 P. (2d) 3.

II.

A regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

The West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

The Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 855.

United States v. *Walters Lumber Co.*, 32 Fed. Supp. 65.

Andrews v. *Montgomery Ward & Co., Inc.*, 30 Fed. Supp. 380.

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Tagg Bros. v. *United States*, 280 U. S. 420, 74 L. ed. 524.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324, 75 A. L. R. 1163.

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Budd v. *New York*, 143 U. S. 517, 36 L. ed. 247.

Carolene Products Co. v. *Banning*, 131 Neb. 429, 268 N. W. 313.

III.

Liberty of contract and liberty of property are subject to the valid exercise of the police power of the state.

Stephenson v. *Binford*, 287 U. S. 251, 77 L. ed. 288.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.
Wenham v. *State*, 65 Neb. 394, 91 N. W. 421.
State v. *Geest*, 118 Neb. 562, 225 N. W. 709.

IV.

The regulation of the maximum fee chargeable by an employment agency is a proper exercise of the police power, because the unemployed and the agency do not stand on a plane of bargaining equality.

Andrews v. *Montgomery Ward & Co., Inc.*, 30 Fed. Supp. 380.
United States v. *Walters Lumber Co.*, 32 Fed. Supp. 65.
Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.
Ribnik v. *McBride*, (dissenting opinion of Mr. Justice Stone) 277 U. S. 350, 72 L. ed. 913.
Abbye Employment Agency, Inc. v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.

V.

Courts take judicial notice that the problems of unemployment are of grave public concern.

Adams v. *Tanner*, 244 U. S. 590, 61 L. ed. 1336.
Brazee v. *Michigan*, 241 U. S. 340, 60 L. ed. 1034.
Abbye Employment Agency, Inc. v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.
Muller v. *Oregon*, 208 U. S. 412, 52 L. ed. 551.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703.

VI.

The State may regulate prices whenever the bargaining parties are not on an equal footing and from such situa-

tion the legislature may reasonably anticipate serious consequences to the community as a whole.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Brass v. *North Dakota*, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612.

Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252, 60 L. ed. 984.

Block v. *Hirsch*, 256 U. S. 135, 65 L. ed. 865.

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Mutual Loan Co. v. *Martell*, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74.

VII.

Any business is affected with a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to protect the rights of the public.

Miami Laundry Co. v. *Florida Dry Cleaning & Laundry Bd.*, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324, 72 A. L. R. 1173.

The Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 1263.

VIII.

Every possible presumption is in favor of the validity of a statute, and the one asserting invalidity has the burden to show that the statute is unconstitutional.

Abbye Employment Agency v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.

State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734.

Appel Mercantile Co. v. *Barker*, 92 Neb. 669, 138 N. W. 1133.

IX.

It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

Abie State Bank v. *Weaver*, 119 Neb. 153, 227 N. W. 922.

Bunting v. *Oregon*, 243 U. S. 426, 61 L. ed. 830.

Borden's Farm Products Co., Inc. v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669.

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 1263.

III.

ARGUMENT.

A.

There Are Sufficient Facts in the Record to Decide the Issue Before the Court.

The respondents contend in their brief, filed in opposition to the granting of a writ of certiorari, that:

> "This court should not be called upon to overrule a decision of the importance of Ribnik v. McBride on a record as deficient as to facts as the one herein." (Respondent's brief, p. 2.)

For a proper approach to a consideration of the argument presented, the issue or issues involved in the lawsuit must be thoroughly understood. We submit that the extent or necessity of a factual background depends entirely upon the issues which are involved in any given controversy.

The issue in this case was limited at the outset by a stipulation of the parties. So far as relevant, it reads:

> "The sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The respondents here (relator below) conceded both in their brief and in oral argument that the only issue was whether the State had the right or power to fix or limit the fees chargeable by an employment agency. That is, they admitted that the State could regulate them by any appropriate means other than price limitation. Inasmuch as the brief and argument just alluded to are not a part of the record before this court, we refer to the language of the Supreme Court of Nebraska to support our assertion as to the issue. From the opinion:

> "Relator concedes that a private employment agency is subject to regulation by the state and may be compelled to pay a license fee for the privilege of conducting such business. Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545." (R. 11.)

> "In the instant case it is true that the relator made no claim that the legislation here objected to on the point at issue was arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." (R. 16.)

As indicated by the quotation, second above, the respondents (relator below) cited the court to the case of *Brazee* v. *Michigan*, which is a strong indication that respondents conceded the force and effect of whatever rule had been announced in that decision. The price regulation provision of the Michigan statute was not before the court in that case, but the question of whether the business of an employment agency was within the category of businesses sufficiently affected with a public interest so as to be subject to regulation under the police power was before the court. On this phase of the case Mr. Justice McReynolds, speaking for the Court, said:

> "Considering our former opinions it seems clear that without violating the Federal Constitution a state, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that, unless regulated, many persons may be exposed to misfortune against which the legislature can properly protect them."

While making the concession that the employment agencies were subject to some types of regulation the relator below relied upon *Ribnik* v. *McBride* to support the contention that the *right* to regulate does not extend to price-fixing.

With reference to legislative price regulation this Court, in the Ribnik case, said:

> "* * * at least in the absence of a grave emergency, * * *, the fixing of prices * * * of wages to be paid, whether minimum or maximum, *is beyond the legislative power*" (p. 357) (Italics added.)

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices." (p. 358.)

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided." (p. 358.)

It thus appears that the challenge thrown out by the respondents was whether the State had the right or authority to regulate the prices of a busines which concededly was subject to other types of regulation. The question of reasonableness was not put in issue. The sole question is, is the State limited in its power to regulate the fees which an employment agency may charge, even though the employment agency business is subject to other types of regulation in the public interest?

We submit that where the only question involved is one as to naked legislative power, and the question of reasonableness is omitted, that an extensive factual record is unnecessary.

The respondents here are entirely responsible for the condition in which this case comes to this Court. One of them instituted the proceedings before the Supreme Court of Nebraska setting forth the reasons why the price limiting provision should be held invalid. The petitioner here (respondent below) filed an answer. The

remaining respondents intervened and adopted the original petition, then the respondents moved for judgment on the pleadings. Surely, it did not devolve upon this petitioner, as respondent below, to make an issue of the reasonableness of the law in question. Therefore, the only reason it is not an issue is because the respondents did not make it one. They were content to rest their case on the sole ground that the legislature simply lacked the power to regulate the fees of an employment agency. The Supreme Court of Nebraska adopted their position. What kind of justice would it be that would permit a litigant to try a lawsuit in one court on an issue which he had raised, and then deny his adversary the right to a review of that very issue in an appellate court because the party who instituted the proceedings did not raise a fact issue? That is substantially the position of the respondents here. They were successful before the Supreme Court of Nebraska on the same pleadings and same factual situation and were satisfied to let that Court decide the issue. But now they want to deny this Court the right to review the judgment of the Nebraska Court because there are not sufficient facts upon which this Court can base a decision. The Supreme Court of Nebraska was not favored with anything which is not before this Court.

On page 4 of respondents' brief they suggest upon what matters evidence should be supplied. Without quoting or repeating all of the suggestions, may we say that whether or not any law is practicable is a legislative problem. And for answers to the balance of the suggestions we quote briefly from the dissenting opinion of Mr. Justice Stone in *Ribnik* v. *McBride, supra*, p. 362, as follows:

"Some presumption should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, for the validity of a regulation turns 'upon the existence of conditions, pecuilar to the business under consideration'. * * * Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of the local tribunals. 'This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' (Citing cases.) And the enactments of state legislatures are entitled to no less respect."

We believe the absence of factual data is a greater detriment to respondents' position than it is to that of petitioner. The view of this court is found in *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324. We quote:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does

> not appear on the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

Here as in the O'Gorman & Young case the statute "deals with a subject clearly within the scope of the police power." In the O'Gorman & Young case it was alleged that the specific method of regulation was unreasonable, but there was no allegation of fact which would show unreasonableness. In the present case there is no allegation of unreasonableness. The present case is a stronger case than the New Jersey case because of this difference. It is, also, true in the instant case that "it does not appear on the face of the statute or from any facts of which the court must take judicial notice" that evils did not exist in Nebraska for which the price limiting provision was an appropriate remedy.

It is also true in the instant case that the action of the legislature indicates the existence of evils for which price regulation is the appropriate remedy.

In the instant case the action of the Supreme Court of Nebraska indicates that such evils did exist. Petitioner makes this statement in spite of the actual outcome of the lawsuit. It must be remembered that the statute in question was attacked as being repugnant to the due process clause of the Nebraska Constitution as well as that of the Federal Constitution. It must be further remembered that so far as the Nebraska Consti-

tution was concerned the Court held the challenged provision valid (R. 12). It was only the unwillingness of the Nebraska Court to depart from *Ribnik* v. *McBride* which led them to declare the provision invalid.

One might say that blind and unwavering obedience to precedent was responsible for the unfortunate decision of the Nebraska Court.

B.

Historical Aspects of Price Fixing.

Inasmuch as respondents, of necessity, must rely upon *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, a careful analysis of that case, its antecedents and its subsequent history, considered with related cases seems essential.

The United States Supreme Court had sustained the legislature's power to regulate prices many times prior to the Ribnik decision. And in cases not involving public utilities. A brief resume will suffice to point out to the Court that price regulation had not always been so repulsive to the United States Supreme Court.

In *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. ed. 757, and *Budd* v. *New York*, 143 U. S. 517, 36 L. ed. 247, regulation of charges which grain elevators could make was upheld.

It has also upheld price regulation in the case of insurance rates. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011; required miners to be

paid per ton of coal unscreened instead of screened, *McLean* v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315; required employers who paid their employees in store orders to redeem them in cash, *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 46 L. ed. 55; fixed the fees chargeable by attorneys appearing for injured employees before the Workmen's Compensation Commission, *Yeiser* v. *Dysart*, 267 U. S. 540, 69 L. ed. 775; fixed the rate of pay for overtime work, *Bunting* v. *Oregon*, 243 U. S. 426, 61 L. ed. 830, 37 Sup. Ct. Rep. 435; regulated maximum rents, *Block* v. *Hirsh*, 256 U. S. 135, 65 L. ed. 865; fixed the maximum rate of interest chargeable on loans, *Griffiths* v. *Connecticut*, 218 U. S. 563, 54 L. ed. 1151.

Many other types of regulation interfering with freedom of contract have been sustained by the Supreme Court on the theory that where evils existed it was within the power of the legislature to correct the evil by the type of regulation which would best accomplish that purpose.

The test laid down by Justice Sutherland in the Ribnik case was:

> "Has the business in question been devoted to the public use and an interest in effect granted to the public in that use?"

Justice Sutherland admitted that "the phrase is not capable of exact definition; but, nevertheless, under all of the decisions of this Court from *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, it is the standard by which the validity of price fixing legislation, in respect of a business like that here under consideration must be tested."

Mr. Justice Stone wrote a masterful dissenting opinion in which he answered every argument advanced by the

majority opinion. In answer to the foregoing quotation he said:

> "Under the decisions of this court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is 'affected with a public interest.' That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."

The majority of the Court were unable to distinguish the case from *Tyson & Bro-United Theater Ticket Offices* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, a case where the regulation involved limited ticket brokers in New York from charging in excess of 50 cents over the box office price.

Justice Stone disposed of the ticket broker case in this manner:

> "In dealing with the question of power to require reasonable prices in this particular business, we should remember what was specifically pointed out by the court in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 438, 71 L. ed. 718, 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426, that whether a business is affected with a 'public interest' turns 'upon the existence of conditions, peculiar to the business under consideration.' In the respects mentioned, or most of them, and in others

to be pointed out, it seems to me that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and, more than all, of ticket brokers, who were involved in Tyson & Bro.-United Theatre Offices v. Banton, supra. There the attempt was made to limit the advance which brokers might charge over box office prices for theatre tickets, an expedient adopted to break up their monopolistic control of a luxury, not a necessity. Those affected by the practices of the ticket brokers constituted a relatively small part of the population within a comparatively small area of the state of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole in any such manner as are fraud and imposition practiced upon workers seeking employment. Here the effort is made, as in Knoxville Iron Co. v. Harbison, supra; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Mutual Loan Co. v. Martell, supra; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L. R. A. (N.S.) 1097, 34 Sup. Ct. Rep. 761, first, to protect from abuse a class unable to protect itself, for whose welfare the police power has often been allowed broad play, and, second, to mitigate the evils which unemployment brings upon the community as a whole.

"Some presumptions should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practises with respect to fees. On this deserved respect for the judgment of the local lawmakers depends, of course, the presumptions in favor of constitutionality, for the validity of a regulation turns 'upon the existence of conditions, peculiar to the business under consideration.' Tyson & Bro.-United Theatre Ticket Offices

v. Banton, supra, 438 (71 L. ed. 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426)."

We submit that there is logic and common sense in Justice Stone's view.

Justice Sutherland relied upon the Court's prior language in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103, to sustain his position. From that case he quoted the following:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, *the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation* * * * one does not devote one's property or business to the public used or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances." (Italics added.)

Since the foregoing language says that the business of "the mining operator" or "the miner" is not clothed "with such a public interest that the price of his product or his wages could be fixed" by regulation, it is interesting to note that in *The Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 84 L. ed. 524, an opinion filed May 20, 1940, the United States Supreme Court said that the business of the mining operator and the miner was affected with such a public interest that the price of the product and the miner's wages could be regulated.

The act provided for the regulation of the bituminous coal industry. Its aim was the stabilization of the industry through *price-fixing* and the elimination of unfair competition. The Commission, which is provided

for by the act, has authority to fix minimum and maximum prices in accordance with stated standards.

The Court said:

> "The regulatory provisions are clearly within the power of Congress under the Commerce Clause of the Constitution."

The powers of Congress under the Commerce Clause are restricted by the 5th Amendment in the same manner as the powers of state legislatures are restricted by the 14th Amendment, so that what the Court has to say as to one is generally applicable to both.

From the foregoing it clearly appears that the *Chas. Wolff Packing Co.* case is no longer law so far as its test of "public interest" is concerned.

The third case relied upon by Justice Sutherland to support his views is *Adkins* v. *Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, a case involving an act of Congress, which fixed minimum wages for women and children in the District of Columbia. The Court held the act violated the due process clause of the 5th Amendment and was, therefore, invalid. Justice Sutherland wrote the majority opinion. Chief Justice Taft, Justices Sanford and Holmes all dissented, Taft and Holmes each writing opinions.

In 1937 the minimum wage law of the State of Washington came to the Supreme Court. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330. The Supreme Court of Washington had sustained the law as a reasonable exercise of the police power. Chief Justice Hughes wrote the opinion. In commenting on the action of the State Court in upholding the law he said:

> "In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."

The final paragraph of the opinion dealt the final blow to the "public use" theory which was controlling in the ticket broker case, *Ribnik* v. *McBride* and the *Adkins* case. It reads:

> "Our conclusion is that the case of Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A. L. R. 1238, supra, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is affirmed."

Thus, we see that one of the supporting props of the Ribnik decision has been completely knocked out and that the theory on which the case was decided has been wholly abandoned. This will more clearly appear as other recent decisions of the Supreme Court are reviewed.

A case decided less than two years following *Ribnik* v. *McBride* is *Tagg Bros. & Moorehead* v. *United States*,

280 U. S. 420. The opinion is written by Brandeis, J., and concurred in by the full Court. Although it does not expressly overrule the Ribnik case, it takes the sting out of it. The plaintiffs brought an action to enjoin the enforcement of regulations prescribed by the Secretary of Agriculture, fixing the fees which commission men could charge the seller for handling his livestock. The regulations were promulgated pursuant to the Packers and Stockyards Act.

Among other arguments advanced by the plaintiffs were the following (p. 438):

> "That while property may be taken for a public use upon payment of just compensation, liberty—personal services—may not be so taken except in time of war or as a punishment for crime; that, since personal services can not be taken for a public use, they cannot be said to be dedicated to a public use or devoted to a public service; that this rate-fixing is in essence wage-fixing, since the stockyard services performed by the plaintiffs involve only skill and labor, and that wage-fixing was held to be beyond the power of Congress, Adkins v. Children's Hospital, 261 U. S. 525; that, even if not obnoxious as an attempt at wage-fixing, the limitation of charges for personal service is precluded by Tyson & Bro. v. Banton, 273 U. S. 418, and Ribnik v. McBride, 277 U. S. 350."

The Court in answer to these contentions said:

> "There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. This Court did not hold in Tyson & Bro. v. Banton and Ribnik v. McBride that charges for personal services cannot be regu-

lated. The question upon which this Court divided in those cases was whether the services there sought to be regulated were *then* affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render."

Justice Brandeis almost apologetically explains the reason for the Tyson & Bro. and Ribnik cases. He, in effect, said that the businesses involved in those were not *"then"* affected with a public interest, indicating quite clearly, we think, that *now* those same businesses probably would be sufficiently affected with a public interest to sustain the price-fixing limitation.

We stated that the case does not expressly overrule *Ribnik* v. *McBride,* so having made the implication that it does so in effect we want to be more explicit. Justice Sutherland, in the course of the Ribnik opinion, said:

"The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a *broker*, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate *broker,* ship *broker,* merchandise *broker* or ticket *broker.* In the Tyson & Bros.-United Theatre Ticket Offices Case, supra, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket *broker,* and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld."

Mr. Justice Sanford concurred with the majority in the Ribnik case because he was unable to distinguish between a labor broker and a ticket broker.

Returning now to the opinion of Brandeis, J., in *Tagg Bros. & Moorehead* v. *United States, supra,* we get both the contention of the plaintiffs and the answer thereto of the Court. It reads:

> "The contention that the Act, if construed as authorizing the order assailed, is void under the due process clause, is likewise unsound. It rests upon the fact that the services for which the Secretary's order fixes the charges are practically the personal services of *brokers.*" (Italics ours.)

In other words, Justice Brandeis says that fixing charges for the personal services of *brokers* is no longer good reason for declaring a price-fixing regulation unconstitutional—the very thing on which the Ribnik decision rested.

The next important case in point of time is *O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251, 75 L. ed. 324, 72 A. L. R. 1173, decided January 5, 1931. The case involved the constitutionality of a New Jersey statute limiting commissions which an insurance company could lawfully pay to its agents. The state court held the law constitutional. The Supreme Court sustained the law as a valid exercise of the police power. The appellants relied upon *Ribnik* v. *McBride, Tyson & Bro.* v. *Banton,* (Ticket broker case), *Chas Wolff Packing Co.* v. *Court of Industrial Relations* (cited in Ribnik case), and *Adkins* v. *Children's Hospital* (cited in Ribnik case), in support of their position. Van Devanter, McReynolds, Sutherland and Butler, J.J., dissented and in their opinion also cited the same cases.

The effect, then, of the O'Gorman & Young decision was to repudiate the principles of *Ribnik* v. *McBride*. The case is important in some of its other aspects and more fully covered subsequently.

We now wish to call the Court's attention to *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. ed. 288, which was decided December 5, 1932. Mr. Justice Sutherland wrote the opinion and Mr. Justice Butler dissented, but wrote no opinion. As the quotations are read it should be remembered that the language is that of the same justice who wrote the Adkins and Ribnik opinions.

This was an appeal by the plaintiffs from a decree of the highest court of Texas, denying an injunction against the enforcement of a Texas statute requiring contract carriers to charge the same price as common carriers. The appellants claimed that their business was not affected with such a public interest as to justify the legislature in fixing the prices for which they could haul merchandise, and cited *Tyson & Bro.* v. *Banton* and *Ribnik* v. *McBride*.

After discussing the evils resulting from the unregulated use of the highways by contract carriers, Sutherland, J., said:

> "Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power. And that this was one of the chief ends sought to be accomplished by the provisions in question, the record amply establishes.
>
> "The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to

> which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.*" (Italics supplied.)

Then he said:

> "Turning our attention then to the provision for permits, it is to be observed that the requirement is not that the private contract carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong (citing cases). Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment."

What the opinion has to say on the question of minimum rates is interesting because of what is said with reference to freedom of contract. It is admitted that this particular opinion does not go so far that we can truthfully say that it supports entirely Respondent's position. However, it is important in that it indicates the trend of the Court back to the position taken by Mr. Justice Stone in his dissenting opinion in the Ribnik case, when he said:

"I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of businesses affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other."

Here is what Justice Sutherland said in *Stephenson v. Binford, supra*:

"The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created, Highland v. Russell Car & Snow Plow Co., supra (279 U. S. at p. 261, 73 L. ed. 691, 49 S. Ct. 314), applies to a state under like circumstances."

Our conclusion is that this opinion recognizes the right of the State to regulate private contracts in whatever manner necessary to remedy evils which may grow out of such contracts.

In the final analysis the Binford case rested on the proposition that the State could regulate private contracts in order to preserve the State's highways. *Is the preservation of the earning power of those who deal with employment agencies of a lesser interest to the State of Nebraska than the preservation of the highways is to the state of Texas?*

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, decided March 5, 1934, is of paramount importance because it is the culmination of the trend which we have tried to indicate in our discussion of the cases since *Ribnik* v. *McBride*.

As is said in the A. L. R. Note (89 A. L. R. 1495):

> "The great importance of this decision (Nebbia v. New York [U. S.] ante, 1469) is obvious. The court in this case gives a new meaning to the phrase 'affected with a public interest,' or rather concludes that this formula is without value in determining the power of a state to regulate a business. *And this decision definitely removes the taboo against price-fixing, and establishes the principle that the private character of a business does not prevent the state from regulating prices therein.* The limitation or test set up by the court is that the legislation must not be arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. And, on these principles, the New York state regulations fixing the price of milk were held to be valid." (Italics supplied.)

The majority opinion was written by Mr. Justice Roberts.

The case involved the constitutionality of a New York Statute which created a Milk Control Board with power to "fix minimum and maximum retail prices to be charged

by * * * stores to consumers off the premises where sold."

The question presented was whether the Federal Constitution prohibited the State from fixing the selling price of milk.

The Court's first consideration was "the occasion for the legislation and its history." It is our intention to give the Court a brief history of the legislation involved here, including the evils sought to be remedied by the law here in question.

Because this case is somewhat of a landmark we quote at length therefrom:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form 'a portion of that immense mass of legislation, which embraces every thing within the territory of a state, * * * all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, * * * are component parts of this mass.'
>
> "Justice Barbour said for this court:
>
> " 'It is not only the right, but the bounden and solemn duty of a state, to advance the

safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal policy, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.'

"And Chief Justice Taney said upon the same subject:

"'But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States.'

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal govern-

ment, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

"The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits

are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety; or may establish zones within which certain types of buildings or businesses are permitted and others excluded. And although the Fourteenth Amendment extends protection to aliens as well as citizens, a State may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.

"Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.

"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them."

The argument of the appellant in the Nebbia case is substantially that of the Respondents here. After discussing the evils sought to be remedied by the price-fixing law, the Court stated the position of the appellant thus:

"But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, *the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden.* His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or

one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends." (Italics added.)

The answer which follows is the same one which should be applied to the contentions of the Respondents.

The answer:

"We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, *what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.* The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents or property. *The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself.* This view was negatived many

years ago. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. *No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves.* Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a 'virtual monopoly.' This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the polic power. It is true that the court cited a statement from Lord Hale's De Portibus Maris, to the effect that when private property is 'affected with a public interest, it ceases to be juris privati only;' but the court proceeded at once to define what it understood by the expression, saying: 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large' (p. 126). This understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power;' and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

" 'From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.'

"In the further discussion of the principle it is said that when one devotes his property to a use, 'in which the public has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. The conclusion is that if Munn and Scott wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

"The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. *The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks on a business which public interest demands shall be regulated, he must know regulation will ensue.*" (Italics supplied.)

After reviewing a number of decisions affirming the right of the state to fix or regulate prices the opinion continues:

"It is clear that there is no closed class or category of businesses affected with a public interest, and

the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, 67 L. ed. 1103, 1108, 43 S. Ct. 630, 27 A. L. R. 1280. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, *it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.* These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. *But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.*

"*So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.* The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial de-

termination to that effect renders a court functus officio." (Italics supplied.)

We quoted above the manner in which the majority opinion disposed of the "affected with a public interest" decisions. We want, for the purpose of emphasis, to restate a part of that quotation:

> "These decisions must rest, *finally* upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect."

"These decisions" refer to the *Tyson & Bro.* v. *Banton,* and *Ribnik* v. *McBride* type of decision.

But the decision in *Ribnik* v. *McBride, supra,* did not rest upon the basis that the regulation was "arbitrary in its operation and effect." It went off on the proposition that "the fixing of *prices for food* or clothing, of house rental or of wages to be paid, whether minimum or maximum, *is beyond the legislative power.*"

"The fixing of prices for food" is exactly what the Court approved in the Nebbia case and exactly what they disapproved (by classification) in the language of the Ribnik decision. The cases simply cannot be reconciled. The effect, therefore, is that the Nebbia decision overruled the Ribnik decision *sub silentia.*

This position is further substantiated by the fact that the appellants in the Nebbia case cited and relied upon *Ribnik* v. *McBride,* and the argument advanced follows the reasoning of the Court in *Ribnik* v. *McBride.* Also, the dissenting opinion cites *Ribnik* v. *McBride* in support of the contention that "a state lacks power to fix prices in similar private businesses." (89 A. L. R. 1491; 291 U. S. 502, 547.)

We again call to the Court's attention that no claim is made by the Relator that the price-limiting regulation here involved is arbitrary, or unreasonable, nor that such means does not remedy the evil which the legislature intended to remedy.

In 1936 the United States Supreme Court rendered another decision in which price-fixing was assailed as repugnant to the 14th Amendment. The case is *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. ed. 1210. The opinion was written by Chief Justice Hughes, and it is significant to note that there were no dissents. It is also worthy of mention that *Ribnik* v. *McBride* was cited by those attacking the law.

The action was one to restrain the enforcement of a Georgia statute fixing the maximum charges that warehousemen could impose upon the seller for handling and selling leaf tobacco. The Georgia Supreme Court had sustained the law as a valid exercise of the police power. The Supreme Court affirmed their judgment, saying:

> "So far as the present controversy turns upon the power of the State to give this sort of protection to this industry, provided its regulation is not arbitrary or confiscatory and in the absence of conflict with the federal power over commerce, our rulings are decisive in support of the state action. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468, 4 Inters. Com. Rep. 45; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857, 4 Inters. Com. Rep. 670; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L. R. A. 1915C 1189; O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130,

72 A. L. R. 1163; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1649."

It is significant to note that the Court cited as authority for the above proposition, *Munn* v. *Illinois* and *German Alliance Ins. Co.* v. *Lewis,* both of which cases were *decided prior to Ribnik* v. *McBride,* and that also cited in support of this proposition was *O'Gorman and Young* v. *Hartford Fire Ins. Co.,* and *Nebbia* v. *New York.* The latter two decisions we have already discussed, both of which were *decided after Ribnik* v. *McBride.* We call this fact to the Court's attention as a further indication that the *Tyson & Br.* v. *Banton* and *Ribnik* v. *McBride* decisions were "astrays." Both before and after those decisions (and the Adkins decision which we have heretofore discussed) the Court has approached this type of regulation on the theory that the State in the exercise of the police power could correct an existing evil by any method which would remedy the situation, unless the regulation was arbitrary or unreasonable. In other words, liberty of contract was recognized as being subject to the valid exercise of the police power.

We heretofore, in the discussion of the Ribnik case, noted the fact that *Adkins* v. *Children's Hospital, supra,* was expressly overruled by *West Coast Hotel Co.* v. *Parrish, supra.* It will be recalled that the Adkins decision invalidated an act of Congress establishing a minimum wage limit for women and children. The West Coast Hotel Company case upheld the same type of law as a valid regulation and not in conflict with the due process provisions of the Constitution. After stating that the Supreme Court of Washington had upheld the statute as a reasonable exercise of the police power, Chief Justice Hughes stated:

"In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." (300 U. S. 379, 389.)

In discussing the limitations imposed by the 14th Amendment, the opinion states:

"The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the Adkins Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under

the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Again the Court, in effect, overruled *Ribnik* v. *McBride*.

A case which states our position clearly and forcibly is *Wholesale Tobacco Dealers Bureau of Southern California, Inc.*, v. *National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 Pac. (2d) 3, decided by the Supreme Court of California on July 28, 1938. It will be noted that the appellant there contended for the adoption of the same rule that Relator is urging upon the Court in the present case. The following is from the opinion by Waste, C. J. (p. 13):

"Appellant, and amici curiae on its behalf, urge that, except as to businesses affected with a public interest, the owner of an article has the constitutional right to sell his property at any price he may desire; that the statute is a price-fixing statute; that price-fixing statutes, except as to businesses affected with a public interest, are per se unconstitutional; that the statute unlawfully interferes with its freedom of contract and unlawfully interferes with its freedom of action. Appellant relies on such cases as Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Tyson & Bro. Ticket Offices v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893, 52 A. L. R. 163; RIBNIK v. McBRIDE, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327; Williams v. Standard Oil Company, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747.

"We do not find it necessary to analyze the above-cited cases. There is no doubt some general language in these cases which tends to sustain appellant's contentions. *The point is that in more recent decisions of the United States Supreme Court these cases have been discussed and have been held not to prohibit the enactment of state statutes predicated on substantially similar concepts as the one here involved.* The leading case on the subject is Nebbia v. New York, supra, involving the validity of the Milk Control Law of New York, which provided for a milk control board with the power to fix the minimum and maximum retail price to be charged for milk. Nebbia was prosecuted for selling milk below the price fixed by the board. Both the New York Court of Appeals (People v. Nebbia, 262 N. Y. 259, 186 N. E. 694) and the United States Supreme Court, supra, upheld the statute as a valid and proper exercise of the police power." (Italics added.)

Another recent case from this court is *State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734. It was decided February 14, 1938. The opinion was written by Mr. Justice Stone. This was an appeal by the defendants from a decree of the District Court of the United States for the Eastern District of South Carolina, enjoining the enforcement of a state statute prohibiting the use on state highways of motor trucks whose width exceeded the statutory limit. The Supreme Court reversed the District Court, saying that

"the judicial function *under* * * * the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present acted within its province, *and whether the means of regulation chosen are reasonably adapted to the end sought.*"

In 1938 Congress passed the Fair Labor Standards Act, which is commonly known as the Wages and Hours

Law. This law established a minimum below which wages could not go and provided for limiting hours. This was one of the things that the opinion in *Ribnik* v. *McBride* said could not be done. In at least three cases arising in Federal District Courts, the Wages and Hours Law has been upheld. In upholding the Wages and Hours regulations, the Court's reasons should be noted because the justification for that law is one of the justifications for the limitation on the amount which an employment agency may exact from an applicant. The United States District Court for the Northern District of Illinois, in *Andrews* v. *Montgomery Ward & Co., Inc.*, 30 F. Supp. 380, stated in the course of its opinion:

> "Regulations of wages and hours of labor is a proper exercise of police power. Employer and employee *do not stand on a plane of equality.* Wages, especially of unskilled employees, tend toward the lowest point at which the laborer can subsist. *The resulting conditions are of interest, not only to the wage earner but the whole community.* The slums of our great cities are, in large part, the fruits of low wages. Vice, crime and disease breed in these districts and spread throughout the community. Certainly if it is within the power of the state to regulate the commissions that may be paid to insurance agents, it is not an unwarranted exercise of the police power to prescribe minimum wages for the protection of the health and good order of society." (Italics added.)

The matter of inequality between the unemployed, who seeks a job, and the employment agency, is a sufficient justification for the intervention by the legislature in behalf of the job seeker.

On March 13, 1940, the District Court of the Southern District of Florida, in *United States* v. *Walters Lumber*

Co., 32 Fed. Supp. 65, in discussing the constitutionality of the Wages and Hours Law, said:

"As to the objection that the statute, by prescribing minimum wages and hours in industry, deprives defendants of liberty of contract without due process of law, contrary to the Fifth Amendment, see West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, 108 A. L. R. 1330, sustaining a state statute prescribing minimum wages for women and minors as against the same objection based on the Fourteenth Amendment, and Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. ed. 1210, sustaining as against a like objection, a state statute prescribing maximum charges for handling and selling leaf tobacco. See, also, the 'Minimum Wage' decisions cited in Kent Stores of New Jersey v. Wilentz, D. C. 14 F. Supp. 1, text page 4. Cit. Nebbia v. People of State of New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469.

"In the West Coast Hotel Co. case, the Supreme Court said: 'The constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. * * * But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the constitution is thus necessarily subject to the restraints of due process, and *regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process* * * * Freedom of contract is a qualified, and not an absolute, right, * * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * *This power under the constitution to restrict freedom of contract* * * * *between employer and employee is undeniable.* * * * In dealing with the relation of employer and em-

> ployed, the legislature has necessarily a wide fiel of discretion in order that there may be suitabl protection of health and safety, and that peace an good order may be promoted through regulation designed to insure wholesome conditions of wor and freedom from oppression." (Italics added.)

The last word of the Supreme Court of the Unite States on price-fixing, is found in *The Sunshine An thracite Coal Co.* v. *Adkins*, the opinion in which wa filed May 20, 1940. It is reported in 310 U. S. 381 84 L. ed. 1263. The act before the Court was on designed to regulate the bituminous coal industry b prescribing minimum and maximum prices for the pro duct of the mine operators. Again we must point ou the adopted language of Justice Sutherland in *Ribnik* v. *McBride, supra*, which was:

> "It has never been supposed since the adoption of the constitution, that the business of * * * *the mining operator or the miner was clothed with such a public interest that the price of his product o his wages could be fixed by state regulation.*"

The law involved in the anthracite coal decision teste by the rule laid down in *Ribnik* v. *McBride* is unconsti tutional. However, the Supreme Court held the act vali and not a violation of the due process provision of th Constitution. We wish to call to the Court's attentio the language found on page 394, which reads:

> "Nor does the Act violate the Fifth Amendment *Price control is one of the means available to th states* (Nebbia v. New York, 291 U. S. 502) an to the Congress (United States v. Rock Royal Co operative, Inc., supra) in their respective domain (Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511) *for the protection and promotion of the welfare o the economy.* But appellant claims that this Act i

not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in nowise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restrictions of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain." (Italics added.)

That the legislature adopted the test laid down at least as far back as *Munn* v. *Illinois,* is borne out by the following language of the Court:

> "It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry."

The test reduced to its simplest form requires only that appropriate methods be adopted to correct the particular evil. This shows clearly that the United States Supreme Court has gotton away from the unfortunate decision in *Ribnik* v. *McBride* and those cases on which it was based.

Not only has the United States Supreme Court gotten away from *Ribnik* v. *McBride, supra,* and all that it stood for, but the State courts have recognized the fact

and they are falling into line behind *Nebbia* v. *New York*, and *West Coast Hotel Co.* v. *Parrish, supra*. The California case of *Wholesale Tobacco Dealers Bureau of South Carolina, Inc.*, v. *National Candy & Tobacco Co., supra*, is an example of this. However, we are unusually fortunate in this connection in having a case from the Supreme Court of New York, decided February 14, 1938, which involved the validity of a price limiting provision in the New York law regulating private employment agencies. The case was a civil action by an agency to recover fees in excess of the statutory limits as per a contract entered into by the parties. The employee defended on the ground that the contract was void, being in violation of the statute. Because of the many points involved in that case which are important here, we quote liberally from *Abbye Employment Agency* v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947:

> "* * * The question to be determined is whether the due process clause of the Federal Constitution, Amendment 14, was contravened when the Legislature fixed the maximum fees provided in the section.
>
> "The New York Statute is distinguishable in a material feature from that involved in the case of Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327, upon which the plaintiff and court below relied in holding the section unconstitutional. There the Legislature had conferred upon the commissioner of labor the power to fix the charges of employment agents for services. Here the Legislature itself fixed the gross fees chargeable to applicants for employment in the enumerated occupations, what at a glance are seen to be common labor of a necessitous class. (In the case at bar the Nebraska Legislature classified all types of job applicants in the one category, feeling that *all* needed the protection of the price limiting provision.) That statute may be said to have in-

jected a stranger to the parties into their contract to decide what compensation for services the parties could agree upon. Our statute leaves the parties free to agree upon the compensation, but marks out the boundary between reasonable rate and extortionate charge. * * *

"We are mindful of the rule that the interpretation of the Federal Constitution by the United States Supreme Court is binding on state courts. (Citing cases.) We also have in mind the rule of the United States Supreme Court that the meaning fixed by the decision of the highest state court will be accepted as being specifically expressed in the statute. However, in the consideration by state courts of the validity under the Federal Constitution of a state statute substantially similar to the statute of another state, *a contrary decision in respect of the latter by the Supreme Court of the United States is not necessarily controlling if it can be fairly demonstrated that the statute under consideration by the state courts is not identical or for other reasons should receive a different interpretation.*

"There has not been any decision called to our attention nor has our investigation discovered any in which any appellate court of our state in a considered opinion has held that section 185 was unconstitutional as a matter of first impression or as controlled by the Ribnik case. It appears also that, in view of the decision of the United States Supreme Court in West Coast Hotel Co. v. Parrish, 300 U. S. 379, etc., reconsideration may be had of constitutional questions decided in a prior case where the validity of the principles upon which that decision rests is challenged and the constitutional interpretation of a different statute is affected by the previous decisions. In the West Coast Hotel Co. Case the validity of the principles upon which the decision in Adkins v. Children's Hospital of District of Columbia, 261 U. S. 525, etc., rested, was challenged. The Adkins Case held invalid the District

of Columbia Minimum Wage Act. The Minimum Wage Law of Washington was attacked in the West Coast Hotel Co. * * * In its conclusion the state court refused to regard the decision in the Adkins Case as determinative. It invoked principles established by other decisions and pointed to them in justifying its decision. * * * In the West Coast Hotel Co. Case the Supreme Court held the position taken by the Washington state court required a reconsideration of the Adkins Case, and upon so doing, overruled that case and affirmed the judgmentment of the Supreme Court of Washington. The Adkins Case and the reasons upon which it was decided were in a measure the basis of the decision in the case of Ribnik v. McBride, supra. As stated, we are of the opinion that the provisions of the New York statute are not identical with the provisions involved in the Ribnik case. In addition, *the principles relied upon in the majority opinion there are challenged here and principles established by other cases are invoked.* * * *.

"Guided by the authority of the West Coast Hotel Co. Case, and for the reasons expressed above, we feel that we are not controlled by the Ribnik Case. * * *

"We are of the conviction that the provisions of section 185, fixing maximum charges of employment agencies to applicants, do not violate the clause of the Fourteenth Amendment providing that no state shall deprive any person of property without due process of law. The regulation of employment agencies was recognized in Brazee v. People of State of Michigan (giving citations); Adams v. Tanner, 244 U. S. 590, etc., and in Ribnik Case, which stated: 'That the state has power to require a license and regulate the business of an employment agent does not admit of doubt.' * * * It has been held that, unless the business is 'affected with a public interest' the contsitution prohibits legislation fixing prices or charges for services and requires that same be left

to the free agreement of the parties. (Citing Munn v. Illinois and other cases.)

"The Legislature, we are persuaded, in the enactment of the statute regulating employment agencies, did not act without reason or for reasons of expediency or in the exercise of an arbitrary power. We indulge the presumption that the Legislature at the time of the enactment had adequate knowledge of evils existing in the dealings between employment agencies and applicants for employment to require a license, the regulation of the business and the fixation of gross fees, * * *. There existed conditions peculiar to the business which affected it with a public interest and required the provisions enacted. Were such presumption denied, recourse is open to us, as it was to the Legislature, to a mass of information on the subject, much of which is given in the minority opinion and footnotes in the Ribnik Case.

"* * * The regulation generally and in particular in respect of maximum charges were designed to insure freedom from oppression by those of a necessitous class in whom the state had a special interest, who were liable to be, and in fact were shown to be, overcharged and exploited by unscrupulous employment agents. In time of depression the public has a particular interest that the unemployed in seeking employment be not subjected to extortionate charges. Unparalleled demands for relief are made upon public funds. When a choice is open between accepting public relief or paying extortionate charge, many are likely to go on public relief. Unfortunately, many others who are conscientious and ambitious will take any employment offered even at extortionate charges rather than accept public relief. These considerations render maximum charges a reasonable regulation. No claim is made that the charges provided are unreasonable or unfair for the service rendered.

Inability to regulate through a maximum charge may circumvent, or render ineffectual, the power to maintain a minimum wage, and thus endanger the right of the applicant to obtain a living wage.

"In the expression of our views we have placed reliance not alone upon principles expressed by the majority of decisions, but also upon many expressed by distinguished jurists in dissent. We might appropriately quote at length from both. We feel that they may be read with more profit in their original context and setting. However, the final observations we intended to make are so clearly and concisely stated by others that we adopt their language to express our thoughts: 'The powerful dissents in Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336; Tyson & Bro.-United Theatre Ticket Offices v. Banton (supra); Ribnik v. McBride (supra), and the narrow margin by which the views of the majority prevailed, warn us that the doctrines of these cases are not likely to extend beyond the precise facts presented.' National Employment Exchange v. Geraghty, 2 Cir., 60 F. (2d) 918, 921, Hand, J. *'No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. * * *.*" (Italics added.)

The respondents in their brief in resistance to petition for writ of certiorari (p. 4) suggest that it should appear in the record of this case what are "the mischiefs or evils, if any, which have grown out of the administration of employment agencies, which price-fixing is calculated to cure." And they added: "In this connection consideration should be given to the existence

of federal, state, charitable and labor-union agencies, established in part under authority of Congress."

We have already discussed this from the angle of such information being essential to a decision of this case. However, there is still another answer which, perhaps, should not be overlooked.

The reason for the establishment of the public agency is found in Justice Stone's dissent in *Ribnik* v. *McBride*, *supra*. A few excerpts will illustrate the point:

> "Examination of the various reports of public bodies and the legislation referred to can, I think, leave no doubt that the practice of the private agencies with respect to their fees presented a problem for legislative consideration different from any other that this court has passed on in ruling on the power to regulate prices, but certainly more akin to that in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, and German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 409, 58 L. ed. 1011, 1020, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612, than to that in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 438, 71 L. ed. 718, 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426, and, unless we are to establish once and for all the rule that only public utilities may be regulated as to price, the validity of the statute at hand would seem to me to be beyond doubt. Certainly it would be difficult to show a greater necessity for price regulation."

The respondents suggest that, perhaps, the establishment of public employment agencies might have eliminated the evils which existed prior to their establishment. One answer is that if such is true the legislature failed to realize it and recognize it by modifying or repealing the law.

Another answer is that evils may persist along with competition and when they do the legislature may interfere in the same manner as though no competition existed. This was ably pointed out by Justice Stone in his Ribnik dissent. After enumerating the instances where legislative price-fixing had been sustained as valid regulations he observed (p. 375):

> "In each of these cases the police power of the state was held broad enough to warrant an interference with free bargaining in cases where, despite the competition that ordinarily attends that freedom, serious evils persisted."

C.

Matters Within Judicial Knowledge.

Mr. Justice Brewer, speaking for this Court in *Mullen* v. *Oregon*, 208 U. S. 412, 52 L. ed. 551, 555, said:

> "We take judicial cognizance of all matters of general knowledge."

Mr. Justice Stone suggested in the Ribnik dissent that an examination of reports of public bodies would show the existence of the evil which price fixing was intended to correct. An examination of official reports of the Bureau of Labor of Nebraska will show the existence of many evils in Nebraska prior to the enactment of the present law regulating private employment agencies.

The Twelfth Biennial Report of the Bureau of Labor and Industrial Statistics of Nebraska, covering the period from January 6, 1909, to December 1, 1910, at page 9 states:

"The employment agency evil as conducted in our large cities is enormous and growing. Thousands of dollars are filched from the poor men and women seeking employment, and often they are sent hundreds of miles only to find they have been deceived and abandoned."

The Fourteenth Biennial Report of the Bureau of Labor and Industrial Statistics of Nebraska, covering the period from February 1, 1913, to December 1, 1914, page 11, contains the following statement:

"I believe a law should be enacted requiring all labor agencies operating in the state to procure a license from the commissioner of labor before engaging in that line of business. It is true these agencies are at present operating under ordinances adopted by the different cities in which they are located, but so much complaint has reached this Department concerning this method of doing business that I suggest a state supervision of all such agencies."

The Fifteenth Biennial Report of the Bureau of Labor and Industrial Statistics of the State of Nebraska, covering the 1915-16 biennium, contains a lengthy discussion of the legislation in Nebraska and other states dealing with the problems created by private employment agencies. The following is taken from page 16:

"Employment agencies conducted for hire specialize. While one agency will cater to tradesmen and unskilled laborers, another agency will cater to those seeking clerical employment. The agency specializing in the trades and unskilled labor field lists the wants of employers and then for a fee gives the information to applicants. The bonding and reference agencies, specializing clerical employments, such as stenographers, salesmen, accountants, etc., first exact a fee from the applicant, commonly called

a registration fee, and then promises to place the applicant. If the agency succeeds in finding employment for the applicant, and the applicant accepts, the applicant must assign not less than 25 per cent of the first month's wages to the agency as a fee for securing the employment, this 25 per cent of the first month's wages being in addition to the registration fee, and sometimes the per cent charged the applicant is as high as 60 per cent—measured generally by just what the traffic will bear. If the applicant secures an advance in wages during a specified time the agency demands an additional per cent from the applicant. If the applicant fails to pay the fee the agency brings suit and garnishees the employer. This procedure generally results in the applicants submitting to the demands of the agency or the loss of employment. The registration fee charged the applicant in the first instance is retained by the agency in each case, regardless of the fact as to whether employment is furnished or not."

The United States Department of Labor, in September, 1937, issued Bulletin No. 630, which contains "Laws Relating to Employment Agencies in the United States as of July 1, 1937."

From the text dealing with private employment agencies, page 6, we quote the following:

"At the present time in the United States there are 42 states which have enacted legislation directly or indirectly regulating the operation of private employment offices. In most of the states provisions are made for the licensing and bonding of such agencies. In addition to the private employment agencies conducted for profit, agencies are also established by various philanthropic organizations, trade-unions, and associations of employers. Agencies created for the placement of professional

workers such as teachers, nurses, etc., are also numerous.

"In the state of Idaho the maintenance of private employment offices for profit is forbidden. Exceptions are made, however, in the case of non-profit employment offices conducted by religious, benevolent, or charitable societies, and those furnishing professional employment.

"One of the reasons given for the establishment of public employment agencies is the alleged abuses practiced by many of the private agencies."

Some of the more common of the fraudulent methods were enumerated by the United States Bureau of Labor in 1912 as follows:

1. Charging a fee and failing to make any effort to find work for the applicant.

2. Sending applicants where no work exists.

3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

4. Collusion between the agent and employer, whereby the applicant is given a few days' work and then discharged to make way for new workmen, the agent and the employer dividing the fee.

5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a "better job".

In spite of the Ribnik decision there are still 26 states which have provisions in their laws to regulate the fees chargeable by the agecies. A compilation of

all the state statutes is contained in the Department of Labor Report of 1937, beginning at page 117.

From the Labor Department Reports, State and Federal, it is obvious that serious evils existed at the time the legislation in question was enacted. There is no showing here that the nature of the business has changed by reason of a change in conditions which would make regulation any less essential now than when the law was enacted. And the Nebraska Legislature has not seen fit to repeal the regulation.

We think the Supreme Court of Florida in *Miami Laundry Co.* v. *Florida Dry Cleaning and Laundry Board*, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956, wrote a fitting summary for the position the Relator takes in this lawsuit. We quote from a very well reasoned opinion by Terrell, J.:

> "The factors determining the regulation of a trade, business, or profession are for legislative determination, but they have generally been actuated by public necessity. If done in the exercise of the police power, the health, morals, and welfare must be involved. It has also been said that the business regulated must be affected by or clothed with a public interest, but regardless of the basis on which done, if public necessity requires it would be contrary to every concept of social justice to hold that the legislature could not grant relief. One may 'Robinson Crusoe like' isolate himself and thereby enjoy the complete unrestrained exercise of his constitutional guaranties, but the moment he becomes a unit in organized society, he surrenders a measure of his freedom and the more thickly that society becomes populated and the more complex its means of making a living become, the more freedom he must make up his mind to surrender.

"There is no magic in the phrase, 'clothed with or affected with a public interest.' Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted. If the regulation involves the question of price limitation, it will be upheld unless clearly shown to be arbitrary, discriminating, or beyond the power of the legislature to enforce. Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A.L.R. 1469; Borden's Farm Products Co., Inc., v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, 108 A. L. R. 1330; Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835. (And other cases.)

"These cases involve some element of the question of price fixing and support the rule that when the conditions in a business become such that the welfare of the public will not be adequately protected by unrestricted competition, or if it be shown that ruinous and chaotic conditions are otherwise about to be brought about in the business, that the economic existence of large numbers of people is being threatened, then the law may step in and prescribe regulations to correct the alleged or threatened abuses.

* * * *

'Courts are not authorized to adjudicate questions of public policy involved in such regulations or to conduct an inquiry into questions of fact pertaining to matters of policy, but where the legislature has made such an investigation and determination, unless shown to be clearly arbitrary, erroneous or unwarranted, the courts will approve them. American Jurisprudence, Vol. II, page 823.

"The legislature is accordingly the judge when the facts are such that a given business should be regulated under the police power or when it is affected with a public interest to such an extent as to require regulation. If the regulation enforced has some reasonable relation to the legislative purpose and is not arbitrary or discriminatory, the requirements of due process are satisfied. In its last analysis, government, regardless of the form it takes, is nothing more than an instrument to preserve an ordered society. Laws are nothing more than rules promulgated by government as a means to an ordered society. It would be a strange anomaly to hold that the complexities in society had become such that the legislature was powerless to grant appropriate relief against abuses arising therefrom."

IV.

CONCLUSION.

The burden of proof falls to the one who attacks the validity of a legislative enactment. That burden has not been sustained here.

This Court takes judicial notice of general economic conditions, of the fact that the unemployed population is a necessitous class who are unable to bargain on terms of equality, the effect upon the general welfare of a large unemployed group; the desirability of promptly supplying the labor market; that the charge of an unconscionable fee affects the ability of the new job holder to readjust himself as a valuable member of society and many other matters of common knowledge and general notoriety.

Ribnik v. *McBride* should be overruled in fact, in order that the meaning of "due process" will not be in doubt.

Finally, we paraphrase the language of this Court in the *West Coast Hotel Co.* case, supra:

> "The legislature had the right to consider that its fee limiting requirement would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all the Court has to decide. Even if the wisdom of the policy be regarded as debatable and its effect uncertain, still the legislature is entitled to its judgment."

Respectfully submitted,

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March 26, 1941.